

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 27-88:

POLSON EDUCATION ASSOCIATION,  
NEA/NEA,

Complainant,

- vs -

LAKE COUNTY ELEMENTARY SCHOOL  
DISTRICT NO. 23 & HIGH SCHOOL  
DISTRICT NO. 23,

Defendant.

FINAL ORDER

\* \* \* \* \*

The Findings of Fact, Conclusions of Law and Recommended Order was issued by Hearing Examiner Arlyn Plowman on August 15, 1989.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Emilie Loring, attorney for the Complainant, on September 4, 1989.

Oral argument was scheduled before the Board of Personnel Appeals on September 27, 1989.

After reviewing the record, considering the briefs and oral arguments, the Board orders as follows.

1. IT IS ORDERED that the Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED that this Board therefore adopt the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Arlyn Plowman as the Final Order of this Board.

1 DATED this 2nd day of October, 1989.

2 BOARD OF PERSONNEL APPEALS

3  
4 By Robert A. Poore  
5 Robert A. Poore  
6 Chairman

7 + + + + +

8 CERTIFICATE OF MAILING

9 I, Joseph J. Poore, do certify that a  
10 true and correct copy of this document was mailed to the  
11 following on the 4th day of October, 1989:

12 Emilie Loring  
13 HILLEY & LORING  
14 500 Daly Avenue  
15 Missoula, MT 59801

16 Catherine Swift  
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20 Helena, MT 59601  
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STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR )  
LABOR PRACTICE CHARGE NO.27-88 )  
POLSON EDUCATION ASSOCIATION, )  
MEA/NEA, )  
Complainant, )

vs. )

LAKE COUNTY ELEMENTARY SCHOOL )  
DISTRICT NO.23 AND HIGH SCHOOL )  
DISTRICT NO.23, )  
Defendant. )

FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
RECOMMENDED ORDER

\* \* \* \* \*

I. INTRODUCTION

A hearing on the above matter was held on March 23, 1989 in Community Room of the Lake County Courthouse in Polson. Emilie Loring represented the complainant, Polson Education Association, MEA/NEA. Rick D'Hooge represented the defendant, Lake County Elementary School District No. 23 and High School District No. 23. Arlyn L. Plowman was the duly appointed hearing examiner for the Board of Personnel Appeals. The parties presented testimony, offered evidence, made argument and filed post hearing briefs. The matter was deemed submitted on May 30, 1989.

II. BACKGROUND

On October 7, 1988 the complainant, Polson Education Association, MEA/NEA filed an unfair labor practice charge with the Board of Personnel Appeals. In that charge the complainant alleged that the defendant, Lake County Elementary School District No. 23 and High School District No. 23 refused to

1 bargain in good faith with the complainant in violation of  
2 Section 39-31-401 (1) and (5) MCA. The complainant charged that  
3 at the beginning of the 1988-1989 school year the defendant  
4 unilaterally instituted a seven (7) period day in the Polson  
5 High School replacing the six (6) period day previously  
6 established. The charge alleged that the unilateral institution  
7 of the seven (7) period day was a unilateral change in the terms  
8 and conditions of employment and therefore an unfair labor  
9 practice.

10 After being granted additional time the defendant filed a  
11 response with the Board of Personnel Appeals on November 1, 1988.  
12 In that response the defendant denied unilaterally instituting a  
13 seven (7) period day, denied that the change to the seven (7)  
14 period day affected the terms and conditions of employment and  
15 further denied that the defendants action was an unfair labor  
16 practice.

17 On November 1, 1988 the matter was referred to an  
18 investigator for the Board of Personnel Appeals who issued an  
19 Investigation Report and Determination on November 9, 1988  
20 finding probable merit for the charges. Subsequently a hearing  
21 examiner was appointed and the matter was noticed for hearing.

### 22 III. FINDINGS OF FACT

23 1. The Lake County School District No. 23 recognizes the  
24 Polson unit of the Montana Education Association as the  
25 exclusive representative of the teachers employed by the School

1 District (see Article 1.1 of joint exhibits 1 and 2).

2 2. During the 1987-1988 school year the Polson High School  
3 operated on a six period school day.

4 3. Previous to and especially during the 1987-1988 school  
5 year there was considerable discussion between/among the faculty  
6 and administration of the Polson High School regarding the seven  
7 period school day. See exhibits D-1, D-2, D-3, D-4, and D-6.

8 4. On March 7, 1988 the Polson Education Association  
9 requested that negotiations begin for a successor agreement to  
10 the existing collective bargaining agreement which was to expire  
11 June 30, 1988 (exhibit D-5).

12 5. Negotiations for the 1988-1989 collective bargaining  
13 agreement commenced on March 23, 1988. On March 30, 1988 the  
14 Polson Education Association proposed that the teacher workday be  
15 defined as seven and one-half (7.5) hours. That proposal was  
16 denied by the School District (exhibit D-11). On April 27, 1988  
17 the School District proposed to define the teacher workday at  
18 seven and three-quarter (7.75) hours.

19 The School District's seven and three-quarter (7.75) hours  
20 teacher workday definition was contained in a School District  
21 package offer which contained several other items including  
22 personal leave and severance pay. After deleting reference to  
23 union security (professional representation fees) the School  
24 District's package offer was signed off by the chairs of the  
25 respective bargaining committees.

1           6.     During May 1988, Polson High School students were  
2 preregistered for the 1988-1989 school year and a six period day.

3           7.     In August 1988 negotiations concluded when a new  
4 collective bargaining agreement for the 1988-1989 school year was  
5 reached by the parties.

6           8.     Following the conclusions of negotiation for 1988-1989  
7 bargaining agreement the School District implemented a seven (7)  
8 period day in the Polson High School. On September 8, 1988 the  
9 Polson Education Association memorialized its objection to the  
10 seven (7) period day in a letter to the School District alleging  
11 that the adoption of the seven (7) period day was a unilateral  
12 change in the terms and conditions of employment for Polson High  
13 School Teachers.

14           9.     The School District denies that the implementation of  
15 the seven (7) period day was a unilateral change in the terms and  
16 conditions of the Polson High School teachers' employment. Both  
17 members of the School District bargaining team testified that  
18 they explained their reason for denying the Polson Education  
19 Association's seven and one-half (7.5) hour teacher workday  
20 proposal and that the rationale for their seven and three-quarter  
21 (7.75) hour teacher workday proposal was to make a seven (7)  
22 period day possible. Both testified that the seven (7) period  
23 day was discussed during the 1988-89 contract negotiations with  
24 the Polson Education Association bargaining team.

25           10.    All three members of the Polson Education Association

1 bargaining committee testified the seven (7) period day was not  
2 discussed during contract negotiations.

3 11. The hearing examiner is stuck with the difficult task  
4 of determining the facts in the face of conflicting testimony.

5 The sequence of events invites suspicion. The defendant's  
6 explanation that preparation for the seven (7) period day could  
7 not begin until the entire Collective Bargaining Agreement had  
8 been ratified is not convincing. It does not seem reasonable that  
9 the School District would expend the time and resources to pre-  
10 register students for a six (6) period day 1988-1989 school year  
11 in May 1988 if they had achieved the seven (7) period day during  
12 negotiations the preceding month on April 27.

13 The complainant submitted no bargaining notes. The  
14 defendant submitted reconstructed versions of bargaining notes  
15 for many if not most bargaining sessions. Bargaining notes for  
16 the April 27 meeting when agreement was reached on the teacher  
17 workday are conspicuous by their absence. Considering the  
18 conflicting testimony the hearing examiner can only surmise as to  
19 the conversations between the parties as they considered the  
20 merits of the seven and one-half (7.5) hour day relative to the  
21 seven and three-quarter (7.75) hour day.

22 It seems very unlikely that the bargaining teams avoided  
23 bargaining table conversation about the seven (7) period day in  
24 view of the extensive discussion elsewhere and the Polson  
25 Education Association's proposal to define the workday. The

1 complainant contends that its bargaining team agreed to a School  
2 District proposal for a seven and three-quarter (7.75) hour  
3 workday after proposing a seven and one-half (7.5) hour work day  
4 without question or discussion regarding the seven (7) period  
5 day. The complainant would have hearing examiner find that the  
6 Polson Education Association bargaining committee accepted the  
7 longer workday proposal without discussion or question regarding  
8 the additional time and/or the motivation behind the School  
9 District's request for a longer workday. I cannot.

10 The demeanor of the witnesses and the  
11 circumstances surrounding the events leading to this complaint  
12 lend credibility to the defendant's contention: the complainant's  
13 bargaining team was fully apprised of the intent behind the  
14 School District's seven and three-quarter (7.75) hour teacher  
15 workday proposal; namely the intent to implement the seven (7)  
16 period day.

17 12. The complainant has failed to show, by a preponderance  
18 of the evidence, that the School District implementation of the  
19 seven (7) period day was a unilateral change in the Polson High  
20 School teachers' terms and conditions of employment.

#### 21 IV. CONCLUSIONS OF LAW

22 1. The Board of Personnel Appeals has jurisdiction in  
23 this matter pursuant to Section 39-31-405 et seq., MCA.

24 2. The Montana Supreme Court has approved the practice of  
25 the Board of Personnel Appeals in using Federal Court and



1 National Labor Relations Board (NLRB) precedents as guidelines in  
2 interpreting the Montana Collective Bargaining for Public  
3 Employees Act as the state act is so similar to the Federal Labor  
4 Management Relations Act, State ex rel. Board of Personnel  
5 Appeals vs. District Court., 181 Montana 223, 598 P.2d 1117, 103  
6 LRRM 2297; Teamster Local No. 45 v. State ex rel. Board of  
7 Personnel Appeals, 1985 Montana 272, 635 P.2d 1310, 110 LRRM  
8 2012; City of Great Falls v. Young (III), 683 P.2d 185, 119 LRRM  
9 2682, 21 Montana 13.

10 3. Pursuant to Section 39-31-406 MCA the complaint's case  
11 must be established by a preponderance of the evidence before an  
12 unfair labor practice maybe found, Board of Trustees v. State of  
13 Montana, 103 LRRM 3090, 604 P.2d 770, 185 Montana 89. See also  
14 Indiana Metal Products v NLRB, 1953 CA 7, 31 LRRM 2490, 202 P.2d  
15 613 and NLRB v Kaiser Aluminum and Chemical Corporation, 34 LRRM  
16 2421, 217 P.2d 366, 1954 CA 9.

17 Jury instructions number 21.0 of the Montana Jury  
18 Instruction Guide states:

19 By preponderance of the evidence is meant such evidence  
20 as, when weighted with that opposed to it, has more  
21 convincing force from which it results that the great  
22 probability of truth lies there in. This means that if  
23 no evidence were given on either side of an issue your  
24 finding would have to be against the party asserting  
25 that issue. In the event the evidence is evenly  
balanced so that you are unable to say that the  
evidence on either side of an issue preponderates, that  
is, has the greater convincing force, then your  
findings on that issue must be against the person who  
has the burden of proving it.

1           4. Pursuant to Section 39-31-401(1) it is an Unfair Labor  
2 Practice for a public employer to interfere with, restrain or  
3 coerce employees in the exercise of the rights guaranteed in  
4 Section 39-31-201, MCA which states that public employees shall  
5 have and shall be protected in the exercise of the right of self  
6 organization, to form, to join, or assist any labor organization,  
7 to bargain collective through representatives of their own  
8 choosing on questions of wages, hours, fringe benefits, and other  
9 conditions of employment, and to engage in other concerted  
10 activities for the purpose of collective bargaining or other  
11 mutual aid or protection free from interference, restraint or  
12 coercion.

13           5. Pursuant to Section 39-31-401(5) MCA it is an unfair  
14 labor practice for a public employer to refuse bargain  
15 collectively in good faith with an exclusive representative.

16           6. Good faith bargaining is defined in Section 39-31-305  
17 MCA as the performance of the mutual obligation of the public  
18 employer or his designated representative and the representatives  
19 of the exclusive representative to meet at reasonable times and  
20 negotiate in good faith with respect to wages, hours, fringe  
21 benefits, and other conditions of employment or the negotiation  
22 of an agreement or any question arising thereunder in the  
23 execution of a written contract incorporating any agreement  
24 reached. Such obligation does not compel either party to agree  
25 to a proposal or require the making of a concession. See NLRB v.

1 American National Insurance Company, 30 LRRM 2147, 343 US 395,  
2 1952; NLRB v. Bancroft Manufacturing Company, Inc., 106 LRRM  
3 2603, 365 F.2d 492, 1981 CA 5; NLRB v. Blevins Popcorn Company,  
4 107 LRRM 3108, 659 F.2d 1173, 1981 CA DC; Struthers Wells  
5 Corporation v. NLRB, 114 LRRM 3553, 721 F.2d 465, 1980 CA 3.

6 7. Pursuant to the foregoing the Defendant was obligated  
7 to bargain collectively in good faith with the Complainant,  
8 Polson Education Association, MEA/NEA.

9 8. An employer violates its duty to bargain collectively  
10 in good faith when it institutes a material change in the terms  
11 and conditions of employment that are compulsory subjects of  
12 bargaining without giving the exclusive bargaining representative  
13 both reasonable notice and an opportunity to negotiate about the  
14 proposed change. See NLRB v Henry Vogt Machine Company, 721 F.2d  
15 465, 114 LRRM 2893, 1983 CA 6; NLRB v Katz, 369 US 736, 50 LRRM  
16 2177, May 21, 1962; Falbro, Inc., (Garment Workers Local 512) v  
17 NLRB, 122 LRRM 3112, 759 F.2d 705, 1986 CA 9; American  
18 Distributing Company, Inc. v NLRB, 715 F.2d 446, 1983 CA 9, 115  
19 LRRM 2046, cert. denied, 466 US 958, 116 LRRM 2096.

20 9. It has been determined that the complainant has failed  
21 to show by a preponderance of the evidence that the defendant's  
22 implementation of the seven (7) period workday was unilateral  
23 and without reasonable notice to the complainant or opportunity  
24 for the complainant to negotiate. Section 39-31-406(5) MCA  
25 states:

1 If, upon the preponderance of the testimony taken the  
2 Board is not of the opinion that the person named in  
3 the complaint has engaged in or is engaging in the  
4 unfair labor practice, then the Board shall state its  
5 findings of fact, and shall issue an order dismissing  
6 the complaint.

7  
8  
9  
10 V. RECOMMENDED ORDER

11 It is hereby ordered that the above captioned unfair labor  
12 practice charge of the Polson Education Association against Lake  
13 County School Elementary District No. 23 and High School District  
14 No. 23 be dismissed.

15 VI. SPECIAL NOTICE

16 Exceptions to these Findings of Fact, Conclusions of Law and  
17 Recommended Order may be filed within twenty (20) days of service  
18 there of. If no exceptions are filed, this Recommended Order  
19 shall become the Final Order of the Board of Personnel Appeals.  
20 Address exceptions to the Board of Personnel Appeals, P.O. Box  
21 1728, Helena, MT 596024-1728.

22 Entered and dated this 15<sup>th</sup> day of August 1989.

23 BOARD OF PERSONNEL APPEALS

24   
25 Arlyn L. Plowman  
Hearing Examiner

EXHIBIT LIST

JOINT EXHIBITS

26 J-1 87-88 Collective Bargaining Agreement  
27 J-2 88-89 Collective Bargaining Agreement

28 COMPLAINANT EXHIBITS

29 C-1 Master Schedule 87-88

C-2 Master Schedule 88-89  
C-3 Class times 88-89  
C-4 Prep time comparisons  
C-5 Contact time comparisons

DEFENDANTS EXHIBITS

D-1 Seven period day committee  
D-2 December 8, 1988, memo from Freshour  
D-3 January 18, 1988, survey  
D-4 Student survey February 1988  
D-5 March 7, 1988, PEA request to begin negotiations  
D-6 March 8, 1988, opinion poll results  
D-7 Northwest Team visitation report  
D-8 Board proposal March 21, 1988  
D-9 Negotiation notes March 23, 1988  
D-10 Board offer March 30, 1988  
D-11 March 30, 1988 negotiations notes  
D-12 April 13, negotiations notes  
D-13 April 20, negotiations notes  
D-14 April 27, a Board offer  
D-15 April 27, a Board offer with signatures  
D-16 May 18, a Board offer  
D-17 May 18, negotiations notes  
D-18 June 1, negotiations notes  
D-19 June 8, negotiations notes  
D-20 July 18, negotiations notes  
D-21 August 1, negotiations notes  
D-22 August 15, negotiations notes  
D-23 Sign off sheet  
D-24 Page from October 7, 1988 student newspaper  
D-25 September 8, 1988 letter from Cox

CERTIFICATE OF SERVICE

The undersigned does certify that a true and correct copy of this document was served upon the following on the 16th day of August 1989, postage paid and addressed as follows:

Emilie Loring  
Hilley and Loring  
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Rick D'Hooge  
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PW417.9

